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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Availability of INTELSAT	)	IB Docket No. 00-91
Space Segment Capacity to	)	
Users and Service Providers	)	
Seeking to Access	)	
INTELSAT Directly	)	

COMMENTS OF LOCKHEED MARTIN CORPORATION

LOCKHEED MARTIN CORPORATION

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SUMMARY

The Commission should focus its efforts in this proceeding on determining whether there is adequate opportunity for carriers and end users to obtain access to INTELSAT capacity and should defer consideration of remedies until it knows whether such opportunity exists and, if not, why not. To the extent that the Commission does address possible remedies, it should focus on providing incentives for commercial solutions and should invoke regulatory intervention only in extremely limited circumstances. Further, the Commission should not consider non-statutory issues, such as post-privatization distribution arrangements, within the scope of this proceeding.

First, the Commission's inquiry in this proceeding should focus on what is required by Sections 641(b) and (c) of the Satellite Act. The Commission's initial task is to determine whether there is adequate opportunity for direct access customers to access INTELSAT capacity. In doing so, the Commission should consider only the extent to which unique customer needs are being met in light of current INTELSAT capacity. If the Commission finds that there is sufficient capacity to satisfy such needs, then these proceedings should be at an end. Similarly, if any capacity shortages are the result of marketplace forces alone, then there is no basis for further Commission action.

Second, the Commission should consider potential remedies only if it finds there is a shortage of INTELSAT capacity to meet unique needs for direct access to INTELSAT and that COMSAT is causing the shortage by holding capacity it does not need. To the extent remedies are considered, commercial solutions that rely on marketplace incentives are far preferable to regulatory measures. Regulatory approaches should be considered only as a last resort, and should be available only where a potential direct access customer has unique needs and if

commercial negotiations have failed. Moreover, regulatory measures should not be imposed if COMSAT is holding the requested capacity to meet its legitimate business needs.

In any event, and as directed by Section 641(c), the Commission may not adopt remedies that abrogate or modify any contract, including COMSAT's existing reservations of INTELSAT capacity. The Commission also should limit its actions under the "anti-circumvention" provisions of Section 641 to cases in which a party acts with the specific intent of circumventing the direct access requirement. In considering these and other elements of the statutory scheme, the Commission should recognize the forward-looking nature of the direct access requirement and should not question COMSAT's business decisions prior to enactment of the ORBIT Act.

Finally, the Commission should not consider extraneous, non-statutory matters in this proceeding. In particular, the Commission should not consider the implementation of direct access in a post-privatization environment, since once INTELSAT is privatized direct access as a regulatory concept becomes irrelevant. Rather, INTELSAT should be treated like any other satellite services provider once it meets the privatization requirements of the ORBIT Act. Indeed, addressing INTELSAT's post-privatization distribution arrangements in this context is, at a minimum, confusing pre-privatization regulatory constructs with private commercial decisions. As a result, post-privatization distribution agreements are best addressed not in this proceeding, but in the diplomatic context of ongoing privatization discussions where the U.S. government is participating fully.

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Lockheed Martin Corporation ("Lockheed Martin") hereby submits these comments for consideration in the above-referenced proceeding.[1] For reasons discussed below, the Commission should confine the scope of this proceeding in accordance with the intent of Congress. Specifically, the Commission should focus on ascertaining whether direct access customers have "sufficient opportunity" to meet their special or unique needs for INTELSAT capacity. If the Commission concludes that there is insufficient capacity to satisfy those needs, then any future proceedings should concentrate on commercial, not regulatory, solutions.

The Commission initiated this proceeding pursuant to the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act"), which was enacted on March 17, 2000.[2] Among other things, the ORBIT Act amended the Communications Satellite Act of 1962 ("Satellite Act") to permit users and providers of telecommunications

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[1] Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly, *Notice of Proposed Rulemaking*, IB Docket No. 00-91 (May 24, 2000) (the "*Notice*").

[2] Pub. L. No. 106-180, 114 Stat. 48 (2000).

services to obtain satellite capacity directly from INTELSAT. The ORBIT Act also directed the Commission to conduct a rulemaking to determine whether there is "sufficient opportunity" for users and service providers to access INTELSAT directly.[3] If the Commission determines that sufficient opportunity to access INTELSAT does not exist, the statute instructs the Commission to take "appropriate action" to facilitate direct access, but prohibits "the abrogation or modification of any contract."[4]

Lockheed Martin has a direct and substantial interest in this proceeding because it owns approximately 49 percent of the stock of COMSAT Corporation ("COMSAT"), the U.S. Signatory to INTELSAT, and also has pending before the FCC an application for authority to acquire control of COMSAT in a merger with a Lockheed Martin subsidiary.[5] Because the factual record in this proceeding has not yet been developed, Lockheed Martin's initial comments focus on fundamental legal and policy issues raised in the *Notice*.

First, the Commission's initial task is to determine whether there is sufficient opportunity for direct access. In this regard, the scope of the Commission's inquiry should be limited to considering actual customer needs in the context of available INTELSAT satellite capacity. If there is no shortage of capacity, or if any shortage is merely a function of market conditions, then there is no basis for further FCC action. This initial step is critical, because at this time the Commission has no evidence that customers are having any difficulty obtaining direct access or

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[3] 47 U.S.C. §§ 641 (a), (b). All references to statutory provisions modified or added by the ORBIT Act in these comments will be to those provisions as codified in the United States Code.

[4] 47 U.S.C. §§ 641 (b), (c).

[5] *See* Applications of Lockheed Martin Corporation, COMSAT Government Systems, LLC and COMSAT Corporation for Transfer of Control of COMSAT Corporation to COMSAT Government Systems, LLC, a wholly-owned subsidiary of Lockheed Martin Corporation, File No. SAT-T/C-20000323-00078 (filed Mar. 23, 2000).

that capacity shortages are caused by anything but an imbalance between demand and finite supply. Only if a shortage results from unreasonable behavior by COMSAT would there be any basis for further FCC actions.

Second, while the *Notice* requests comment on possible "appropriate action" to facilitate direct access, Lockheed Martin believes it would be entirely premature to propose remedies, let alone reach conclusions at such an early juncture in the fact-gathering stage of this proceeding. If the Commission ultimately concludes that sufficient opportunity for direct access does not exist, Lockheed Martin agrees that the focus should be on commercial solutions, not regulation, to resolve such issues. Regulatory intervention should be available only if commercial negotiations fail despite good faith efforts but, in any event, should not occur if COMSAT is holding capacity for legitimate business needs.

Third, the Commission should not interfere in COMSAT's business relationships with its customers or with INTELSAT. This approach is consistent with the forward-looking nature of the direct access requirement and with the anti-circumvention provision of Section 641(b), which was not intended to apply to pre-enactment behavior.

Finally, any measures that might be required by Section 641 must be transitional only. Once INTELSAT is fully privatized in accordance with the requirements of the ORBIT Act, "direct access" as a regulatory concept becomes irrelevant. Post-privatization, INTELSAT should be treated like any other satellite company that makes distribution arrangements based on market and other business considerations. Thus, any steps the Commission might take under Section 641(b) necessarily would be temporary in nature.

I. Background

A. The ORBIT Act

The ORBIT Act represents the culmination of years of work by Congress, the Administration and the private sector, and reflects a carefully crafted compromise to promote a competitive global market for satellite services. For example, the ORBIT Act established criteria for INTELSAT and Inmarsat privatization for the FCC to use in making licensing decisions regarding the access of these organizations, and their successor and separated entities, to the U.S. telecommunications market.[6] In addition, the ORBIT Act eliminated restrictive ownership and governance provisions of the Satellite Act to permit the Lockheed Martin/COMSAT merger and the resultant competitive benefits.[7] The ORBIT Act also prohibits certain exclusive arrangements by any satellite services provider to provide service between the United States and other countries.[8] By enacting these and other provisions of the ORBIT Act, Congress and the Administration contemplate that INTELSAT soon will be privatized in a manner that will enhance global telecommunications competition.

The ORBIT Act also amended the Satellite Act to permit users and providers of telecommunications services to obtain INTELSAT satellite capacity and services directly from INTELSAT (*i.e.*, Level 3 direct access).[9] In effect, the ORBIT Act codified the Commission's earlier decision to permit Level 3 direct access.[10] As noted in the *Direct Access Order*, Level 3

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[6] 47 U.S.C. §§ 601-624.

[7] 47 U.S.C. § 645.

[8] 47 U.S.C. § 648.

[9] 47 U.S.C. § 641(a). This provision applies only to INTELSAT, the intergovernmental organization, and not to any successors in interest.

[10] *See* Direct Access to the INTELSAT System, *Report and Order*, 14 FCC Rcd 15703 (1999) (*"Direct Access Order"*).

direct access in the United States is intended to be a "forward-looking policy that permits U.S. carriers additional choice in future decisions on obtaining INTELSAT space segment capacity."[11]

In Section 641(b) of the Satellite Act, Congress directed the Commission to complete a rulemaking to determine whether users and providers of telecommunications services have "sufficient opportunity" for direct access to INTELSAT.[12] If the Commission concludes that sufficient opportunity for direct access to INTELSAT does not exist, Congress instructed the Commission to take "appropriate action" to facilitate direct access.[13] However, Congress expressly limited the Commission's authority to take action under Section 641 by providing that "[n]othing in this section shall be construed to permit the abrogation or modification of any contract."[14]

B. The Notice

As required by Section 641(b), the Commission initiated this proceeding to determine whether users and providers of telecommunications services have sufficient opportunity to obtain space segment capacity directly from INTELSAT.[15] In the *Notice*, the Commission requested comment on what should constitute sufficient opportunity to access INTELSAT directly.[16] In addition, the Commission directed COMSAT to provide detailed information regarding the status

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[11] *Id.* at 15794.

[12] 47 U.S.C. § 641(b).

[13] *Id.*

[14] 47 U.S.C. § 641(c).

[15] *Notice*, ¶ 1.

[16] *Id.*, ¶ 21.

of existing and planned INTELSAT satellite capacity.[17] The Commission further asked users and service providers to demonstrate the extent to which INTELSAT is their sole or preferred capacity provider, and whether INTELSAT capacity held by COMSAT is unique to their needs.[18] Finally, the Commission requested comment on appropriate regulatory responses if it were to conclude there is insufficient opportunity to access INTELSAT. In this regard, the Commission inquired as to the meaning of "appropriate action" in Section 641(b) of the Satellite Act in light of Section 641(c)'s directive that nothing in Section 641 should be construed to permit the abrogation or modification of any contract.[19]

The *Notice* properly acknowledged certain key considerations that must guide the Commission's actions in this proceeding. First, the Commission recognized that the concept of "sufficient opportunity" for direct access is, of necessity, limited by practical constraints on INTELSAT capacity and by customers' actual requirements for INTELSAT space segment. If the Commission concludes in light of these factors that customers have sufficient opportunity to access INTELSAT capacity, this proceeding should thereupon be terminated.[20] Second, the Commission concluded, as it did in the *Direct Access Order*, that if there is insufficient opportunity to access INTELSAT directly, the primary method for resolving capacity issues should be commercial solutions negotiated by COMSAT and affected users and service

[17] *Id.*, ¶ 20. The Commission also requested users and service providers to comment as to whether uncommitted capacity on existing and future INTELSAT satellites will provide sufficient opportunity to access INTELSAT directly to meet their service or capacity requirements. *Id.*, ¶ 21.

[18] *Id.*, ¶¶ 21, 23.

[19] *Id.*, ¶ 24.

[20] *Id.*, ¶ 10.

providers.[21] Third, the Commission recognized that regulatory action should be reserved for extraordinary circumstances where a service provider can demonstrate that COMSAT is holding capacity that is unique to its needs and that COMSAT has not engaged in good faith negotiations to find a commercial solution.[22] Finally, the *Notice* appropriately observed that Section 641(c) explicitly provides that nothing in Section 641 shall be construed to permit the abrogation or modification of any contract.[23]

II. The Commission Must Ensure That the Outcome of This Proceeding Is Consistent with the Intent of Section 641 of the Satellite Act [¶¶ 21, 24-28]

A. The Satellite Act Limits the Scope of This Proceeding [¶¶ 21, 24-28]

As an initial matter, the Commission must determine the nature and extent of the inquiry required by Section 641 of the Satellite Act. This proceeding should not become a forum for generalized complaints that there is insufficient INTELSAT capacity to meet every conceivable desire for direct access, but rather should focus on the actual *needs* of users and service providers. In addition, the Commission should follow the path prescribed by Congress and use this proceeding to determine whether there is "sufficient opportunity" to access INTELSAT capacity, instead of prematurely adopting solutions to a "problem" that may not exist.

1. Section 641(b) Contemplates a Focused Examination of INTELSAT Capacity Issues That Defines the Scope of This Proceeding [¶¶ 21, 24]

Section 641(b) of the Satellite Act specifies that the Commission shall examine whether "users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment directly from INTELSAT to meet their service or capacity

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[21] *Id.*, ¶ 27; *see also Direct Access Order*, 14 FCC Rcd at 15755.

[22] *Notice*, ¶ 27.

[23] *Id.*, ¶ 24.

requirements."[24] This language describes the scope of the examination that Congress expects the Commission to undertake. In particular, and as recognized in the *Notice,* Section 641(b) does not contemplate that the Commission will engage in a wide-ranging examination of whether there is sufficient INTELSAT capacity to accommodate all possible direct access customers and their every potential request. Rather, the Commission should examine the extent to which INTELSAT capacity is available to meet specific customer needs.

Practical considerations support a focused approach to this proceeding. As repeatedly recognized in the *Notice,* even with a shortage of INTELSAT capacity, there would be no predicate for FCC action unless that capacity "is the only capacity available to meet the needs of a particular user or service provider[.]"[25] This approach acknowledges that not all customer requests to access INTELSAT capacity (or, for that matter, any other carrier's facilities) necessarily can be accommodated, and that a customer's "unique need" for INTELSAT capacity is relevant to whether there is "sufficient opportunity" to use that capacity.[26]

Further, creating an unbridled right to use INTELSAT capacity would undermine the incentives for potential direct access customers to negotiate with COMSAT in good faith or to explore reasonable commercial alternatives. On the other hand, limiting this inquiry to whether

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[24] 47 U.S.C. § 641(b).

[25] *Notice,* ¶ 27. As described below, and consistent with the *Notice,* even in such circumstances there is no basis for Commission intervention if COMSAT is holding INTELSAT capacity for legitimate purposes. *See infra* Sections II(B), (D).

[26] Traditionally, the Commission has accorded carriers considerable latitude when confronted by a capacity shortfall, and have permitted those carriers to accommodate requests for capacity on a first-come, first-served basis. *See* RCA American Communications, Inc.; Tariffs F.C.C. Nos. 1 and 2, *Memorandum Opinion and Order,* 84 FCC 2d 781, 786 (1981) (citing *Metrock Corporation,* 73 FCC 2d 802, 806 (1979) ("first-come, first-served" method of allocating MDS service by a carrier found not unreasonable); Spanish International Network v. RCA American Communications, Inc., *Memorandum Opinion and Order,* 78 FCC 2d 1451, 1469-70 (1980) (Awarding transponders on a first-come, first-served basis was not discriminatory.)).

there is sufficient capacity to meet actual customer *requirements* will ensure that potential users of INTELSAT services retain sufficient incentives to engage in normal commercial behavior, including seeking suitable alternatives to finite INTELSAT capacity.

2. The Commission Should Not Adopt Regulatory Measures in This Initial Phase of the Proceeding [¶¶ 25-28]

The initial phase of this proceeding should focus on developing a factual record as to availability of INTELSAT capacity for direct access customers and the reasons for any shortfall. Both the language of Section 641(b) and practical concerns demonstrate that the Commission should not attempt to take any other actions until the results of this inquiry are known.

This approach is consistent with the terms of Section 641(b), which contemplates a phased process for addressing INTELSAT capacity issues. In particular, Section 641(b) requires the Commission to complete its factual determination within the 180-day statutory time limit.[27] The statute then permits action only if the Commission determines that there is insufficient opportunity to access INTELSAT capacity. The 180-day time limit does not apply to any "appropriate action" the Commission may take as a consequence of its findings.[28] Thus, under Section 641(b), Congress did not foresee the FCC taking any action until after it had made a factual determination that there is a problem in need of a solution.

The *Notice* is consistent with this reading of Section 641(b). The *Notice* seeks information concerning the use and availability of INTELSAT capacity and on the standards for

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[27] 47 U.S.C. § 641(b) ("Within 180 days of enactment of this title, the Commission shall complete a rulemaking . . . to determine" whether there is sufficient access to INTELSAT capacity.)

[28] *Id.* (The Commission "shall take appropriate action" if it determines there is not sufficient access to INTELSAT capacity.)

determining whether there is sufficient opportunity to access that capacity.[29] The *Notice* specifically contemplates that any regulatory action, if required, would occur in subsequent proceedings.[30] The *Notice* also recognizes that, in the absence of this information, it is too soon to propose any regulatory actions to remedy possible capacity shortages.[31] In addition, the *Notice* anticipates that the first response to any capacity shortage should be to rely on commercial negotiations.[32] Each of these considerations confirms that the Commission is pursuing the course prescribed by Congress.

It also would be premature for the Commission to consider any "solutions" to a problem that has not been shown to exist. As the *Notice* observes, the Commission does not have any evidence that customers are experiencing difficulty in obtaining direct access to INTELSAT capacity, let alone evidence that capacity shortages generally result from anything other than an excess of demand over supply.[33] Even if there are capacity shortages, it would be impractical to propose, let alone adopt, any solutions until the Commission knows the extent of those shortages and why they exist. Thus, the Commission should complete its factual inquiry and make appropriate threshold findings prior to expending any effort in consideration of potential remedies.

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[29] *See Notice,* ¶¶ 16-24.

[30] *Id.*, ¶ 3.

[31] *Id.*, ¶ 28.

[32] *Id.*, ¶ 27; *see also infra* Section II(B).

[33] *See Notice*, ¶ 19. As discussed below, to the extent that the Commission concludes that there is an INTELSAT capacity shortage, there is no basis for any regulatory action if the capacity allocated to COMSAT is being used or reserved to serve COMSAT's customers. *See infra* Section II(B).

B. Commercial Solutions Are Preferable to Regulatory Mandates If the Commission Determines that There Is Not Sufficient Opportunity for Direct Access [¶¶ 25-28]

In the *Notice*, the Commission concluded that, if users and service providers do not have sufficient opportunity to access INTELSAT directly, the first option for resolving this issue should be commercial solutions between COMSAT and any affected party.[34] This approach originally was adopted by the Commission in the *Direct Access Order*.[35] Lockheed Martin strongly agrees that, to the extent users and providers of telecommunications services do not have sufficient opportunity for direct access, commercial solutions should be the primary means for resolving any capacity constraints.

Commercial negotiations offer the most efficient means of addressing capacity issues and are more likely than regulatory intervention to result in a solution that accommodates the specific needs of a user or service provider. Furthermore, the results of commercial negotiations are more likely to reflect the realities of the marketplace. There are strong incentives for COMSAT to reach commercial solutions with its affected customers, and COMSAT has already amply demonstrated its willingness to address customer issues. Similarly, Lockheed Martin also has a very strong incentive to see that commercial solutions succeed, for Lockheed Martin has an interest in developing and preserving long-term customer relationships as it expands its role in the satellite services sector. Accordingly, the Commission should rely primarily on unfettered negotiations between the parties to resolve capacity constraints, and should refrain from imposing requirements that could undermine the incentives *any* party has to reach a negotiated agreement.

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[34] *Notice*, ¶ 25.

[35] *Direct Access Order*, 14 FCC Rcd at 15754.

The Commission should consider regulatory intervention only as a last resort in the event that commercial negotiations prove unavailing. If a commercial solution cannot be reached, Lockheed Martin generally agrees with the Commission's suggested approach to considering requests for regulatory action. Specifically, regulatory action would be appropriate only when a user or service provider can demonstrate that COMSAT is holding capacity that is unique to its requirements and that COMSAT has not engaged in good faith negotiations to reach a commercial solution.[36] The Commission also should ensure that parties requesting capacity negotiate in good faith, so that the incentive to make unreasonable demands will be reduced. Furthermore, consistent with the forward-looking nature of the Commission's direct access policy, Lockheed Martin agrees with the Commission that any regulatory intervention, where otherwise justified, should be limited solely to planned, rather than existing, INTELSAT satellite capacity.[37]

If these threshold conditions are met, the Commission should intervene only if it determines that COMSAT is using control of INTELSAT capacity for the purpose of extending its prior exclusive access to INTELSAT and denying users and service providers the benefits of direct access.[38] If, however, COMSAT has entered into arrangements with INTELSAT for legitimate business purposes, including meeting known or anticipated service requests from customers, those arrangements must not be disturbed. Indeed, attempting to interfere with COMSAT's access to INTELSAT not only would harm COMSAT, but could harm COMSAT customers that might be unable to make alternative arrangements.

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[36] *Notice*, ¶ 27.

[37] *See id.*

[38] *See id.*

Lockheed Martin also believes that the Commission can promote access to INTELSAT satellite capacity through the Commission's satellite licensing process. Specifically, to the extent there is a capacity constraint, the best solution would be for the Commission to authorize INTELSAT to operate a sufficient number of satellites to meet the needs of all potential customers.

C. Section 641(c) of the Satellite Act Prohibits the Abrogation or Modification of Any Contract [¶ 24]

Section 641(b) of the Satellite Act provides that, if the Commission determines that users and service providers do not have sufficient opportunity to access INTELSAT directly, the Commission should take "appropriate action" to facilitate direct access.[39] However, in Section 641(c), Congress expressly limits the range of "appropriate action" by providing that "[n]othing in this section shall be construed to permit the abrogation or modification of any contract."[40]

Section 641(c) is clear on its face. *Nothing* in Section 641, including Section 641(b)'s instruction that the Commission take "appropriate action" to facilitate direct access, shall be construed to permit the abrogation of *any* contract. This directive reflects a clear Congressional intent to establish the inviolability of all contractual arrangements in proceedings under Section 641, including COMSAT's capacity contracts with INTELSAT and COMSAT's service contracts with its customers.[41] Because Section 641(c) must be given full effect and interpreted

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[39] 47 U.S.C. §641(b).

[40] 47 U.S.C. § 641(c).

[41] As the Commission has recognized, COMSAT's long-term capacity arrangements with INTELSAT fall within the meaning of the term "contract." *Direct Access Order*, 14 FCC Rcd at 15792 n. 500 (describing such arrangement as "*contractual* reservation—by way of long-term *contracts*—of capacity on INTELSAT") (emphasis supplied); *see also* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 20541, 20666 (1996) (deferring to state law whether a

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in accordance with its plain meaning, this statutory provision can be read only to prohibit the Commission from abrogating or modifying any contract when taking "appropriate action" under Section 641.[42]

Finally, the Commission requests comment on the effect of Section 641(c) on existing precedents that permit the Commission to prescribe changes in contracts if it finds provisions unlawful or to modify contract provisions if doing so is required in the public interest.[43] It is apparent that Section 641(c) was intended to preserve the Commission's independent authority to modify contracts *in other contexts*. However, as discussed above, Section 641(c) prohibits the abrogation or modification of any contract in the context of FCC action pursuant to Section 641.

D. The Commission's Anti-Circumvention Authority Is Limited to Circumstances in Which the Intent to Circumvent Is Clear [¶ 24]

The final sentence of Section 641(b) gives the Commission the power to "take such steps as may be necessary to prevent circumvention of the intent of this section."[44] As with the other elements of Section 641(b), this language should be construed to limit the circumstances under which the Commission may act, and specifically to give the Commission power only when a party acts with the intent to circumvent Section 641. The Commission should not attempt to

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particular agreement constitutes a contract, but defining the term "contract" broadly to be "at least, a lawful agreement where both parties intended to be bound").

[42] Where the language of a statute is unambiguous, the Commission must "give effect to the unambiguously expressed intent of Congress." Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, *Report and Order and Further Notice of Proposed Inquiry*, 1999 FCC LEXIS 4804 (Sept. 29, 1999) at para. 114 (*citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

[43] *See Notice*, ¶ 24 n. 40. The Commission previously has recognized that COMSAT's existing customer contracts are lawful and that COMSAT's customers freely negotiated these contracts. *Direct Access Order*, 14 FCC Rcd at 15755.

[44] 47 U.S.C. § 641(b).

exercise this anti-circumvention authority when a party acts for legitimate business or regulatory purposes, nor should it reach back to interfere with arrangements made by COMSAT prior to passage of the ORBIT Act.

In evaluating its authority, the Commission should be guided by the specific intent of the anti-circumvention provision. This provision is narrow in scope and it applies only when there is an effort to circumvent direct access to the INTELSAT system. Thus, an intent to prevent direct access is required. In the absence of such intent, there is no basis for Commission intervention. Said differently, this language does not give the Commission power to act if COMSAT obtains INTELSAT capacity to meet legitimate business needs or to fulfill valid regulatory objectives adopted by the Commission in other proceedings.

These limitations on the FCC's authority are significant for two reasons. First, as the Commission recognized in the *Direct Access Order*, COMSAT's existing long-term contracts with INTELSAT and its reservations of future capacity were made in light of COMSAT's expected needs for capacity, including its existing customer contracts and its projected future customer requirements.[45] Indeed, because COMSAT obtains its Fixed Satellite Service transmission capacity from INTELSAT, reserving capacity is the only way COMSAT can ensure that it will be able to meet future customer needs.[46]

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[45] *See Direct Access Order*, 14 FCC Rcd at 15753 (Ten-year contracts expiring in 2003 represent 50 percent of COMSAT's INTELSAT revenues), 15754 (Long-term contracts "have been the basis for COMSAT to in turn make commitments to INTELSAT. . .").

[46] Moreover, COMSAT's capacity reservations are an integral part of INTELSAT's planning and procurement process. INTELSAT will not build satellites unless it can be confident that the capacity of those satellites will be used by COMSAT, other Signatories and direct access users. For similar reasons, the Commission has recognized in other contexts that reserving capacity in advance of actual requirements is a normal business practice and sometimes is necessary when capacity is limited or otherwise constrained. *See generally* American Telephone and Telegraph Company, *Memorandum Opinion, Order and Authorization*, 4 FCC Rcd 8042, 8049 (1989)

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Second, COMSAT's use of long-term contracts was set into motion by the Commission in connection with the order ending the former traffic loading requirements.[47] The Commission's intent was to prevent COMSAT from experiencing a sudden decline in traffic once carriers no longer were required to split their international traffic between COMSAT and undersea cables.[48] To the extent that any INTELSAT capacity constraints result in part from this policy, it would be inappropriate to punish COMSAT for complying with the Commission's regulatory objectives.

In this context, the Commission should presume that any COMSAT arrangements with INTELSAT entered into before the Commission adopted the *Direct Access Order* were intended to meet COMSAT's legitimate business needs. COMSAT could not have had the requisite intent to circumvent direct access before the Commission decided that direct access would be required or, for that matter, to circumvent Section 641 of the Satellite Act before it was enacted. In fact, it would have been imprudent for COMSAT to stop acquiring capacity from INTELSAT while awaiting the Commission action in the direct access proceeding.

As to capacity acquired after the *Direct Access Order*, the Commission should recognize that, in the absence of specific evidence of an intent to circumvent direct access, there is no reason to believe that COMSAT is acquiring more capacity than it requires to meet its legitimate

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(recognizing "fully subscribed status" as a factor in approving proposed undersea cable); American Telephone and Telegraph Company, *Memorandum Opinion, Order and Authorization*, 63 FCC 2d 166, 173-4 (1997) (describing how projected customer requirements are used to plan construction).

[47] *See Direct Access Order*, 14 FCC Rcd at 15754, citing Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, *Report and Order*, 3 FCC Rcd 2156, 2157, 2161 (1988).

[48] *Id.*

business needs. As described above, there is little incentive for COMSAT to hoard capacity, and the business risks of doing so would be significant because competitive international transmission capacity is increasing rapidly.[49] Consequently, the Commission should impose a heavy burden on any party that seeks to disturb COMSAT's legitimate reservations of INTELSAT capacity.

III. This Rulemaking Must Focus on a Factual Inquiry Pursuant to Section 641(b), Not on Extraneous Non-Statutory Issues [¶ 17]

The stated purpose of the *Notice* is to assist the Commission in determining if, pursuant to Section 641(b), "sufficient opportunity" exists for users and service providers to access INTELSAT directly to meet their service or capacity requirements. In other words, this is a factual inquiry on the availability of INTELSAT capacity to meet market demand for direct access to space segment. The ORBIT Act instructs the Commission to complete this narrow inquiry within 180 days of enactment. As the Commission notes early in the *Notice*, it intends to make the determination required by Section 641(b) no later than September 13, 2000, and if warranted, to initiate additional proceedings in the future.[50]

As described above, given the short, statutorily-mandated timeframe for this proceeding, Lockheed Martin believes the Commission must limit its inquiry to the narrow issue set out in Section 641(b) and consider other issues only if and when they are necessary in a future proceeding. The only issue truly germane to this proceeding is whether there is sufficient opportunity to obtain reasonably available capacity on INTELSAT satellites. Lockheed Martin believes this is an ample undertaking given the complexity of the factual inquiry and the

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[49] *See supra* Section II(B).

[50] *Notice*, ¶ 3.

statutory deadline for completion. Nonetheless, because the *Notice* raises additional non-statutory issues, Lockheed Martin believes it is compelled to address some of those issues in a general way and with the reservation that they are not within the scope of the inquiry required pursuant to Section 641(b).

A. Direct Access as a Regulatory Concept Becomes Irrelevant in a Post-Privatization Environment [¶ 17]

When the Commission instituted Level 3 Direct Access to INTELSAT space segment to and from the United States, it altered U.S. domestic policy concerning access to INTELSAT space segment by U.S. users. The FCC simply changed domestic U.S. policy, as many other participating member-administrations previously had done with respect to their domestic policy on access to an inter-governmental satellite organization ("IGO"). Since enactment of the Satellite Act and until very recently, U.S. access to INTELSAT capacity was solely through COMSAT. The Commission's decision to change long-standing U.S. arrangements and institute direct access to INTELSAT space segment was no more than a reflection of Commission judgment on appropriate regulatory policy given the current market and competitive environments.[51]

Lockheed Martin does not see a need for continuing regulation of access to INTELSAT in a post-privatization environment. While Lockheed Martin will not address in these comments whether the ORBIT Act permits the continuation of direct access regulation following INTELSAT privatization, regulatorily-mandated direct access is not an appropriate substitute for marketplace forces and legitimate business considerations once INTELSAT is privatized and

[51] Lockheed Martin notes that "direct access" is a term of art that applies to access to IGO space segment. Once INTELSAT is privatized, and thus no longer is an IGO, the term "direct access" has no context and becomes totally irrelevant. Furthermore, once the IGO no longer exists, INTELSAT's direct access program disappears along with all other appurtenances of IGO status.

operating like any other commercial system. Indeed, PanAmSat, Loral/Orion and GE/Columbia are not required to provide "direct access" to their space segment. Access to their space segment is assured through an open and competitive marketplace. The entire aim of privatizing INTELSAT is to ensure that it operates, and is able to respond to marketplace forces, in the same manner as all other suppliers of international space segment. Therefore, there is no basis to conclude, as the *Notice* suggests, that a regulator-imposed scheme of direct access is warranted or advisable once INTELSAT is privatized.[52] Indeed, maintaining direct access regulation would negate the purpose and impetus for privatizing INTELSAT, as well as policies of the United States during the past decade favoring marketplace forces over regulation.

B. Post-Privatization Distribution Arrangements Are Only Properly Addressed in the Context of Ongoing Privatization Discussions [¶ 17]

Just as direct access to INTELSAT should become a moot issue in a post-privatization environment, the Commission need not consider INTELSAT's post-privatization distribution arrangements as part of this proceeding. Post-privatization distribution arrangements are a matter for ongoing privatization discussions within INTELSAT and among Signatories and Parties, not for the Commission alone. The ORBIT Act sets out congressionally-mandated privatization criteria.[53] These criteria will guide the Executive Branch in its discussions with other INTELSAT Parties on how best to ensure that INTELSAT is privatized in a fully competitive manner. The Commission is required to use these same statutory criteria in considering any application by a privatized INTELSAT for access to the U.S. market or by an earth station operator seeking to access INTELSAT space segment in a post-privatization

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[52] *Notice*, ¶ 16.

[53] *See* 47 U.S.C. §§ 601, 621, 622.

environment. Congress concluded that, if the enumerated criteria are substantially met, the privatized entity is presumed not to harm competition, and thus grant of any application will be pro-competitive. Nothing in the ORBIT Act suggests, let alone requires, that "direct access" to the privatized entity is one of the enumerated considerations for privatization. Similarly, there is no reference to post-privatization distribution arrangements anywhere in the ORBIT Act. Once the ORBIT Act criteria are met, there will be no need for INTELSAT to be regulated in a manner different from its competitors.

Lockheed Martin strongly disagrees with the *Notice*'s conclusion that comment on post-privatization distribution arrangements is appropriate in this proceeding.[54] If and when the Commission or the Administration finds it necessary or advisable to seek advice on the ongoing privatization discussions, this should be done in a discrete manner that appropriately focuses on those issues. It is counterproductive to engage in discussions of privatization issues in a public rulemaking whose sole statutory purpose is to evaluate opportunities for access to INTELSAT capacity in the *pre*-privatization context. For more than five years, the Commission and the Executive Branch have been involved in ongoing discussions on the privatization of INTELSAT. Thus, the United States has ample opportunity to make its views known on distribution arrangements through its active and appropriate participation in the ongoing INTELSAT privatization discussion process. The ORBIT Act sets forth U.S. policy on how best to achieve a "pro-competitive" privatization of INTELSAT. If post-privatization distribution arrangements are issues to be discussed and negotiated, this must be done in a manner consistent with the

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[54] *Notice*, ¶ 17 n.27.

diplomatic nature of the privatization process, as informed by the ORBIT Act, and within the context of the ongoing privatization discussions.

Moreover, the manner in which the privatized INTELSAT distributes its capacity should be judged no differently from the way other international satellite companies conduct their business affairs. No one has mandated that Globalstar/Vodafone/AirTouch, Iridium, Teledesic/ICO or even New Skies and PanAmSat distribute their capacity or conduct their businesses according to regulatory prescription. Indeed, it is antithetical to sound regulatory practice to direct private entities on how best to distribute their goods and services. The privatization criteria set out in the ORBIT Act take into account what is needed for INTELSAT to be privatized in a "pro-competitive" manner. Once a pro-competitive privatization has been achieved, the means by which the resulting entity decides to distribute its services must be left to its owners and management and to marketplace forces. There is no logical or factual basis for attempting to treat a pro-competitively privatized INTELSAT differently from any of its competitors.

Lockheed Martin also notes that any discussion of a regulatorily-mandated distribution arrangement suggests the possibility that INTELSAT would be subject to dominant common carrier regulation after privatization. If the privatized INTELSAT is expected to compete with other satellite systems that are not regulated as common carriers (which we believe is the case for all others), INTELSAT must have the same regulatory flexibility available to its competitors. Not only must INTELSAT as a corporate entity be able to decide how best to serve its customers, it must be able to respond to market forces with agility, unhampered by unnecessary regulatory strictures. A pro-competitively privatized INTELSAT should be able to elect non-common carrier status in the same manner available to its competitors. Likewise, it should be

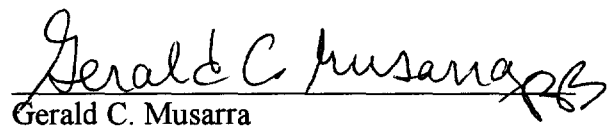
able to distribute its services in a manner best suited to the needs of its customers in a competitive environment.

IV. Conclusion

For the foregoing reasons, Lockheed Martin respectfully requests the Commission to proceed in this rulemaking in accordance with the comments set forth herein.

Respectfully submitted,

LOCKHEED MARTIN CORPORATION



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June 23, 2000

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I, Cynthia S. Shaw, do hereby certify that on this 23rd day of June, 2000, a copy of the foregoing "Comments of Lockheed Martin Corporation" was sent via hand delivery to the following:

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